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In the Supreme Court of the United States

OCTOBER TERM, 1905.

No. 258 21

NEW YORK FOUNDLING HOSPITAL,
Petitioner and Appellant,
vs.
JOHN C. GATTI,
Respondent and Appellee.

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Appeal from the Supreme Court of the Territory of Arizona.

Brief for Appellee.

as Motion (appendix.)

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STATEMENT

This is a petition for a writ of *habeas corpus*, original in the Supreme Court of Arizona. After a full hearing before the Court in bank, upon the return, the writ was dismissed. A full statement of the facts found by the Supreme Court of Arizona is contained in the transcript of the record in the case (folios 465-473) and, briefly stated, such facts are as follows, viz.:

The petitioner is an incorporated charitable institution, of New York, deriving its powers from a special act of the Legislature of New York, a copy of which act is contained in the record (folios 27-36). By this act of the

Legislature the corporation is given the following powers:

1. To take charge, custody and management of foundling and deserted children.

2. When such children arrive at proper age, to bind out, indenture or apprentice such children to some profession, trade or employment, and, in case of the death of the mother, to assume charge and management of such children.

3. By the act referred to the corporation is constituted the guardian of the children so "bound out or held for service under the provisions of this act."

The above we believe to be all the powers of the petitioner corporation under the act creating it, so far as affects the case at bar.

On October 4, 1902, the child William Norton was born in the New York Foundling Hospital and was, with its mother's consent, taken in charge, custody and management by the hospital.

In September, 1904, the petitioner shipped a carload of the hospital children to Arizona, tagged and consigned to Mexican-Indians in and around the towns of Clifton and Morenci, in Graham county, Arizona, and on their arrival they were delivered to the several consignees by the agents of the hospital in charge

of the band of children without any examination of the character of the consignees or their homes.

The children were about equally divided as to sex; were all of the white, Caucasian race; of fair complexion; were clean and neatly clad and of unusual intelligence and beauty, and from one and one-half to three years of age.

The consignees to whom the children were delivered were found by the Supreme Court of Arizona, after a full hearing upon the merits, to be "the lowest class of halfbreed Mexican-Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, and, in several cases, prostitutes and persons of notoriously bad character. Their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs, and many of them had children of their own whom they were unable to support, and were entirely unfit to have the care, custody, control and education of white, Caucasian children." (Folio 469 Tr. of Record.) The child William Norton was consigned and delivered to Santos Gonzales, and is now in the possession and control of the respondent, John C. Gatti.

After the distribution of the children at Clifton, the leading white citizens, including

the law officers of the county, protested to the agent in charge of the band of children against the delivery of the children to the consignees on account of their race, personal character and general unfitness. This protest was without avail. The people were told, in effect, that it was none of their business. The agent in charge of the children declaring that the children had been "placed and would stay placed." (Folio 470 Tr. of Record.) There upon the assembled people of Clifton appointed a committee of reputable white citizens to take the children from the halfbreed Mexican-Indians with whom they had been placed and bring them to the hotel in Clifton. The children were all thereupon surrendered to the committee without protest and by them taken to the hotel.

The condition of the children, when returned to the hotel, is found by the Court in the following language:

"Upon the arrival of the train in Clifton, all the children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican-Indians, they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects

of coarse Mexican beans, chilis, watermelons, and other improper food which had been fed them, and in some instances from the effects of beer and whisky that had been given them to drink. Upon the arrival of the children at the hotel, certain good women of the place took charge of them, nursed them and secured medical care and attention for them. On the next day the children were distributed among the several respondents in these cases, who have since had them in their care, custody and control." (Folio 471 Tr. of Record.)

After this action by the Clifton people, and when it became apparent that the people of Morenci would not permit the children distributed there to remain with the Mexican-Indians, to whom they had been delivered, the agents in charge of the band took those children themselves and returned with them in the car in which they had been brought out.

In regard to the fitness of the present custodians of the children and what the best interests of the children demand, the Court makes the following finding:

"Each of the respondents is a fit and proper person to have the care, custody, control and education of the children. They are in every case people of sufficient means properly to care for and educate the children, and in every case they are fit persons by reason of

their character, standing and age to have and maintain such care, custody and control. Without exception, they have become greatly attached to the children and the children to them; and each respondent desires to retain the possession of the child which he has, in order that he may rear it as one of his own family. We further find that it would be detrimental to each of said children to take it from the custody of the respondent who now has it in his care, and that the best interests of each of said children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care." (Folios 472-473, Tr. of Record.)

On October 16, 1904, applications were made by each of the respondents to the Probate Court of Graham county for letters of guardianship of the person of the child which each possessed. Petitioner had notice of such application, appeared by counsel and resisted the same, and in each case letters of guardianship were granted to the respondent and each respondent duly qualified as such guardian, including the respondent John C. Gatti, as guardian of the child William Norton. Thereupon the petitioner appealed from the order granting said letters in each case, to the District Court of Graham County, Arizona, and pending said appeal these petitions were

filed, and, in response to the writ, the children were brought before the Supreme Court of Arizona.

It is stipulated in this case that all the writs shall abide the result of this case.

BRIEF

I.

This being a proceeding by *habeas corpus* to invoke the powers of this Court, as *parens patriae* to award the care, custody and control of a minor child, it is not a case of *habeas corpus* "involving the question of personal freedom" within the meaning of Sec. 1909 of the Revised Statutes of the United States, and this Court has no jurisdiction to review the judgment of the Supreme Court of the Territory of Arizona on this appeal.

Sec. 1909, Rev. Stat. U. S.
Gonzales vs. Cunningham, 164 U. S. 612.
In re Burrus, 136 U. S. 586.
In re Barry, 42 Fed. 113.
King vs. McLean Asylum, 64 Fed. 331.
Clifford vs. Williams, 131 Fed. 100.

II.

The charter of the New York Foundling Hospital gives it no power to place children

confided to its care in other homes or institutions, either within or without the State of New York, or to retain any control over them when so placed, except in case of children of suitable age, bound out or apprenticed to some trade, profession or employment. (See charter of petitioner, folios 27-36, Tr. of Record).

III.

The New York Foundling Hospital is a foreign corporation in relation to the Territory of Arizona; as such foreign corporation, or as *de facto* foreign guardian, it could exercise no power or authority over the minor child as a matter of right in the Territory of Arizona. It has not complied with the laws of Arizona, so as to give it any standing as a corporation, in that it has not filed in the office of the Territorial Auditor a copy of its charter or appointment of an agent upon whom process can be served. (See statement of fact, folio 466 of transcript.) Therefore all its acts in said Territory are void and it can maintain no action in the courts of that Territory.

Chapter IX Rev. Stat. Ariz. 1901.
Morgan vs. Potter, 157 U. S. 195.
Hoyt vs. Sprague, 103 U. S. 613, 631.
Jones vs Bowman, 67 L. R. A. 860.
In re Nichols Estate, 34 Pac. 250.

IV.

At the time of the issuance of the writ of *habeas corpus* the respondent was the guardian of the minor child William Norton, by appointment of the Probate Court of Graham county, Arizona, and had qualified and was acting as such guardian. The respondent could, not as a matter of law, be guilty of restraining or depriving his ward of his liberty.

Fitts vs. Fitts, 21 Tex. 511.
Ferguson vs. Ferguson, 36 Mo. 197.
Mathews vs. Wade, 2 West Va. 464.
Ex parte Miller, 109 Cal. 643.
In re Chin Mee Ho, 73 Pac. 1002.
In re Lundberg, 77 Pac. 156.
Church on ***Habeas Corpus***, Sec. 457.

V.

On appeal from the Supreme Courts of the Territories, the Supreme Court of the United States is by statute restricted to an inquiry whether the findings of fact made by the Court below support its judgment, and to a review of exceptions duly taken to rulings on admission or rejection of evidence.

Grayson vs. Lynch, 163 U. S. 468.
Bear Lake vs. Garland, 164 U. S. 1-18.
Harrison vs. Pearce, 168 U. S. 311-323.
Young vs. Army, 171 U. S. 171-183.

Apache County vs. Barth, 177 U. S. 538-542.

VI.

In all cases in which the Court has jurisdiction to award the custody of a minor child, the best interests of the child is the controlling consideration.

In re Barry, 42 Fed. 113-121.
Woodworth vs. Spring, 4 Allen 321.
Kelsey vs. Gollee, 69 Conn. 291.
Lamar vs. Harris, 44 S. E. 867.
Church on *Habeas Corpus*, Sec. 446.

ARGUMENT

I.

We believe this Court is without jurisdiction in this appeal.

In the case of Gonzales vs. Cunningham, 164 U. S. 612, this Court has clearly pointed out that all its jurisdiction to review the judgments and orders of the Supreme Courts of the Territories is derived from sections 702 and 1909 of the U. S. Revised Statutes, the latter of which, after enumerating other cases in which the right of review of such orders and judgments is given to this Court, adds; "upon

writs of *habeas corpus* involving the question of personal freedom."

It seems clear that the words "involving the question of personal freedom" are words of limitation and are intended to give this Court jurisdiction to review on appeal only those cases of *habeas corpus* which are sued out by the person who is himself actually deprived of his liberty, and not that class of cases where the writ is employed in civil litigation by parties each claiming posession of an infant, and in which the powers of the Court or chancellor as *parens patriae* are invoked. in the case of a contest for the care, custody and control of a child of tender years, the "question of personal freedom" cannot be involved. It is only the place and character of confinement, and not the legality of any restraint whatever, that is involved. Whichever party to such litigation is successful, the restraint must be the same, and the contest is only as to place and character of that restraint. The distinction between those cases which truly involve personal freedom and those cases in which the alleged unlawful detention is a mere fiction of the law to enable the chancellor to exercise his prerogative as *parens patriae* are clearly pointed out by the Circuit Court of

Appeals, First District, in the case of King vs. McLean, 64 Fed. 331-335.

The provisions of the U. S. Revised Statutes (Sec. 1909) regarding the review by this Court of orders and judgments of the Supreme Courts of the Territories in *habeas corpus* are certainly more restricted than the powers granted by Sec. 752 to the Judges of the United States Courts to grant the writ. The former limit the power of review to those cases of *habeas corpus* "involving the question of personal freedom." The latter confer power to grant the writ "for the purpose of an inquiry into the cause of restraint of liberty." Yet this Court has held that a District Court of the United States has no jurisdiction to issue a writ of *habeas corpus* to restore an infant to the custody of its father.

In re Burrus, 136 U. S. 586.

The same question was before the Circuit Court of Appeals, First District, in the case of King vs. McLean Asylum, etc., in which the the Court says:

"On the whole, in view of the considerations which we have stated in an earlier portion of this opinion, we feel ourselves unauthorized to accept *In re* Burrus beyond the issue solemnly determined in the case, w[illegible]

was, that the District Courts of the United States have not jurisdiction *parens patriae* to issue the writ of *habeas corpus*."

King vs. McLean Asylum, 64 Fed. 331-350.

We think the limitation of the jurisdiction of this Court to review orders and decrees of the Supreme Courts of the Territories, imposed by section 1909, Revised Statutes United States, to cases "involving the question of personal freedom" was placed there for the very purpose of excluding from the consideration of this Court all *habeas corpus* cases involving the domestic relations, or wherein the prerogative of the trial court as *parens patriae* is invoked, for the reason that in such cases there is usually involved matters of discretion rather than right. As said by the Circuit Court of Appeals, First District, in the case before referred to:

"We may as well emphasize at this point the distinction between proceedings under the writ, when they *truly involve personal liberty*, and proceedings like those before Judge Betts and Judge Shaw, touching the custody of a child. * * * * The former involve matters of right, but the latter only the exercise of a wise discretion as to care, maintenance or ed-

ucation, and the writ is merely a convenient incident of the litigation."

King vs. McLean Asylum, 64 Fed. 331, 335.

II.

By the statement of facts found by the Supreme Court of Arizona it appears that the child William Norton was voluntarily brought by the petitioner into the Territory of Arizona and placed in the care, custody and control of a resident of that Territory, with the purpose and intention of making that Territory the place of domicile and permanent residence of the child. (Folio 467 Tr. of Record).

The act of the Legislature of New York, passed May 11, 1872, purporting to be an amendment to the charter of the New York Foundling Hospital, a copy of which is attached to the petition for the writ (folios 27-36, Tr. of Record), is the only source of power or authority relied on by the petitioner to maintain this preceding. Being a corporation, it can have no powers except those expressly conferred by its charter or necessarily implied from the powers so conferred. We do not find expressed in said charter any power or authority in the hospital to place the children in its charge in other homes, either within or without the State of New York, or

to retain any authority or control over them after they are so placed. Nor do we believe any such thing is contemplated by the act referred to.

It is true that by section 2 of the act referred to, the hospital is given power "when the children in their care shall respectively attain a proper age, to place them at suitable employments, and cause them to be instructed in suitable branches of knowledge, and, at discretion, to bind out or indenture such children, etc. * * *;" and by section 8 the managers of the hospital are constituted the guardian of children so "bound out or held for service under the provisions of this act * * *." But it will hardly be contended that these provisions can be made to embrace the case of a child barely two years of age, placed for adoption without the State of New York.

There being, therefore, nothing in the charter of the hospital giving its managers any authority to place out children of tender years for adoption, or any dominion over such children, if they are so placed without such authority, it seems clear that by the act of so placing them the hospital managers surrender all power, dominion and authority over them. We do not dispute that the powers of a court of chancery may always be invoked in

a proper proceeding to take a child of tender years from an improper or unfit custodian and make such disposition of it as its best interests demand, but no such unfitness in the respondent has been shown or alleged, and the right of control which the hospital once had has been voluntarily abandoned.

III.

Whatever may have been the status of the petitioner regarding the child William Norton in the State of New York, it could not have any power or authority over the child in the Territory of Arizona. The findings show that the child was voluntarily brought into Arizona by the petitioner and placed in the hands of a resident of Arizona, with the purpose and intention that the child should be adopted by such resident (folio 467 Tr. of Record), and should itself be and remain a permanent resident of Arizona. The petitioner thereby surrendered every vestige of authority or control over the child, either to reclaim it or to change its foster parentage. It is not questioned that the courts of that Territory, when properly invoked, can and will exercise the prerogative of the Territory as *parens patriae*, and deal with the child as with any other minor domiciled in the Territory, as its best interests de-

mand. But we deny any right in the petitioner —the New York corporation—to assert a claim, in itself, to its care, custody or control. We think all such right was surrendered by the placing of such child in the hands of a resident of Arizona for adoption.

Furthermore the statutes of Arizona provide, in effect, that every foreign corporation, before transacting any business in that Territory, shall file in the office of the Territorial Auditor a copy of its charter and the appointment of a resident of the Territory as its agent, upon whom process may be served, which shall be taken as personal service on the corporation. The statute further provides that no such corporation shall transact any business whatever in the Territory until these provisions are complied with, and, when complied with, the corporation may appear and prosecute or defend actions in the courts of the Territory. We take it that the statute means that until the provisions above mentioned are complied with the corporation shall not be permitted to appear, or prosecute, or defend any action in the courts of the Territory.

The sections of the statutes of Arizona upon the subject above referred to are as follows:

"909. (Sec. 149) Any company incorporated under the laws of any other State, Ter-

ritory, or foreign country, which shall carry on any business, enterprise or occupation in this Territory shall, before entering upon, doing or transacting such business, enterprise or occupation in this Territory, file a certified and duly authenticated copy of its articles of incorporation or charter and the appointment of an agent, as herein after specified, with the Secretary of the Territory and the County Recorder in each county in this Territory, in which such business, enterprise or occupation is carried on, and shall publish, at least six times, in some newspaper published in each of the counties in this Territory in which such business, enterprise or occupation is to be carried on, a copy of its articles of incorporation, and, upon the expiration thereof, file an affidavit in the office of the Secretary of the Territory, stating that such publication has been made according to law. This section, however, shall not apply to insurance corporations.

"911. (Sec. 150.) Any such foreign corporation shall, in writing, over the hand of its president or other chief officer, attested by its secretary or by a resolution of its board of directors, appoint a resident agent in each county in this Territory in which it proposes to carry on any business, enterprise or occupation. All such agents shall be actual and *bona fide* residents of the county for which they are appointed, and of the Territory for at least three years, and the full name and residence of

each shall be stated in the writing appointing them.

"911. (Sec. 151.) No corporation such as is mentioned in section 149 of this title shall transact any business whatsoever in this Territory until and unless it shall have first filed its articles of incorporation and appointment of an agent, as required in the two preceding sections, and every act done by it prior to the filing thereof shall be utterly void." (Chapter IX, Title 13, pp. 349-350, Revised Statutes of Arizona, 1901.)

The findings show that the petitioner has never complied with these provisions of the statute (folio 466 Tr. of Record) and we therefore insist that it has no power to maintain this petition.

The evident purpose of the statute is to require all foreign corporations dealing with residents of the Territory to submit themselves to the orders and decrees of the courts of that Territory, before they are permitted to invoke the aid of those courts.

This provision is a most salutory one, and we think the petitioner in this case should be denied a hearing, for the reason that it has not conformed to the requirements of this statute.

IV.

At the time of the suing out of the writ of *habeas corpus* in this case the respondent,

John C. Gatti, was the duly appointed, qualified and acting guardian of the child, William Norton, by appointment of the Probate Court of Graham county, Arizona, which Court is, by statute, given exclusive jurisdiction of the appointment of guardians of minors. The Arizona statutes pertaining to the appointment of guardians and their right and duties, are as follows:

Paragraph 1954:

"The Probate Judge of each county, when it appears necessary or convenient, may appoint guardians for the persons or estates, or either, or both of them, of minors, who have no guardian legally appointed by will, or deed, and who are inhabitants or residents of the county or who reside without the Territory, and have estate within the county. * * ."

Paragraph 1959.

"If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same."

Paragraph 1960.

"Every guardian appointed shall have the custody and care of the minor, and the care and management of his estate, until such minor arrives at the age of majority or

marries, or until the guardian is legally discharged.

Paragraph 1973:

"A guardian, appointed by a Court, has power over the person and property of the ward, unless otherwise ordered."

Paragraph 1974:

"A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the ward at any place within the Territory, but not elsewhere, without permission of the Court." (Title 17, Chapter XIV, Guardian and Ward; Article 1, Guardian of Minors, Revised Statutes of Arizona, 1901.)

The Supreme Court of Arizona incorporated the fact of this guardianship in its findings. (Folio 473 Tr. of Record.) Upon this finding we think it became at once the duty of the Court to dismiss the writ. Although there are some authorities to the contrary, the weight of authority, we think, is to the effect that in *habeas corpus* for the possession of a minor child, the plea of guardianship by the respondent is a complete answer to the writ, and that upon a trial of such plea the Court will not inquire into the right of guardianship,

except so far as to ascertain that the Court appointing the guardian had jurisdiction to make the appointment.

Church on *Habeas Corpus*, Secs. 170 and 457.
Ex parte Miller, 109 Cal. 43.
In re Lundberg, 77 Pac. 156.
In re Chin Mee Ho, 73 Pac. 1002.
Fitts vs, Fitts, 21 Tex. 511.

It is true that in this case the petitioner has attempted to appeal from the order of the Probate Court appointing the respondent the guardian of the minor child, and to this end has, in form, taken all the steps necessary to perfect such appeal. But we think this will be of no avail for two reasons: First, because petitioner, being neither the parent or guardian of the minor, has no sufficient interest to give the right to appeal; and, being a foriegn corporation and not having complied with the laws of the Territory, by filing in the Secretary's office a copy of its charter and the appointment of a resident agent, it cannot rightfully do any act or appear in or prosecute or defend in any proceeding in the courts of this Territory, and, second, because, even if such appeal could be rightfully maintained by petitioner, such appeal does not vacate or suspend the oper-

ation of the judgment of the Probate Court appointing the respondent such guardian.

Estate of Moore, 86 Cal. 72.
Estate of Coogan, 65 Cal. 332
Morrell vs. Phillips, 34 Conn. 112
State vs. Probate Court, 17 La. 432.
Successors of Kennedy, 29 La. Am. 408.
State vs. McCowan, 21 Vt. 305.
Dutcher vs. Culver, 23 Minn. 415

The last case cited very clearly points out why the appeal in such cases should not vacate the order. In case of an appeal from an order appointing an administrator, the estate would be left without a legal custodian, and in case of an appeal from an order appointing a guardian, the infant would be without legal protection. We therefore confidently believe that, at the time of the suing out of this writ, the respondent was the legally constitued guardian of the child, and, under the statutes of Arizona, was entitled to its custody and control, until the order appointing him should be vacated by a direct proceeding instituted for that purpose.

V.

On appeal from the Supreme Court of the Territories, this Court is bound by the facts found by the Supreme Court, and, as the ap-

pellant has not assigned for error any ruling of the Supreme Court of Arizona upon the admission or rejection of evidence or any other ruling of that Court at the hearing (folios 117-118 Tr. of Record), the reporter's transcript of the evidence (being folios 129 457 of the printed Tr. of Record) has no place in the record in this court and must be disregarded.

VI.

On appeals from the Supreme Courts of the Territories this Court will not look beyond the findings of such Courts for the facts in the case. In this case the Supreme Court of Arizona finds these facts:

"Each of the respondents is a fit and proper person to have the care, custody and education of the children. They are in each case people of sufficient means properly to care for and educate the children, and in every case they are fit persons, by reason of their character, standing and age to have and maintain such care, custody and control; without exception, they have become greatly attached to the children and the children to them, and each respondent desires to retain the possession of the child which he has, in order that he may rear it as one of his own family. We further find that it would be detrimental to each of said children to take it from the custody of the respondent who now has it in his care and

that the interests of each of such children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care." (Folio 472 Tr. of Record.)

It should be borne in mind that the writ of *habeas corpus* in this case was issued by, and returnable to, the Supreme Court of Arizona; and that upon the return, with the respondents and the children present in court, the full bench heard the testimony orally and had full opportunity to personally observe the respondents and the children. (See statement and opinion in the case, pp. 40-52, Tr. of Record.)

The finding of fact above quoted would seem to be determinative of this appeal, aside from all other facts and considerations. In all cases involving the matter of the custody of a minor child the best interests of the child is "the pole star by which the Court is guided."

Church on *Habeas Corpus*, Sec. 446.

What is for the best interests of the child is a matter of judicial discretion. The exercise of such discretion will never be reviewed or the judgment based thereon reversed, except where such discretion has been grossly abused.

The fact that it will be detrimental to the child to take it from the respondent and that

its best interests require that the respondent be allowed to keep it being admitted, or rather established, by this appeal, this Court is asked to do that which is detrimental to the welfare of the children and against their best interests. We cannot conceive of any mere legal right in the New York corporation (even if it had such legal right) which could justify such action of the court. And what is the basis of the legal right claimed by the corporation? It cannot rely on the right of natural or foster-parentage, or legislative or judicial guardianship, for it is invested with neither. Confessedly these children were voluntarily brought by the petitioner from the State of New York into the jurisdiction of the Territory of Arizona for the purpose of finding permanent homes therein, and of being adopted by residents of Arizona. This result, whether mediately or immediately, has been accomplished, and the homes secured for them are far better than the petioner under the most favorable circumstances could have secured.

The object for which the children were taken to Arizona having been accomplished, what possible ground of complaint can the petitioner have? That those homes are not of its own selection cannot be sufficient, especially when the character of the homes it

did select for the children is considered. It is unnecessary to characterize those homes beyond the description of them by the Supreme Court of Arizona in its findings, but the contemplation of the condition of these children in those homes, leaves the mind aghast with horror. White, Caucasian children of both sexes, of fair complexions—the latter qualification by request of the consignees—of unusual beauty and attractiveness (Finding V, folio 467 Tr. of Record) to be condemned to the life of "the lowest class of half breed Mexican-Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, prostitutes and persons of notoriously bad character"! (finding VII, folio 469, Tr. of Record.) The inference is obvious. The mind recoils in horror and the moral sense revolts at the spectacle. Would it not have been a blot on our civilization if the white people of Clifton and Morenci had permitted this crime to be consummated in their midst? Were not the influential white citizens accompanied by the peace officers of the precinct (finding VIII, folio 470, Tr. of Record) justified in acting promptly and effectively to right this wrong? True, our courts are open and our judges able and just, but distances are great, communications slow, uncertain and roundabout, and cases of this

character will not admit of delay. Promptly as the American citizens of Clifton acted, the process of degredation had begun.

"Upon the arrival of the train in Clifton all the children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican-Indians they were in a filthy condition, covered with vermin, and with two or three excepions, ill and nauseated from the effects of coarse Mexican beans, chili, watermelons, and other improper food which had been fed them, and in some instances, from the effects of beer and whisky that had been given them to drink." (Finding IX, folio 471, Tr. of Record.)

There can be no question that but for the interference of the white citizens of Clifton and Morenci this process of degradation would have proceeded until it had reached its legitimate and contemplated infamy, from which death in any form would have been a merciful release.

We do not wish to be understood as imputing to the New York Foundling Hospital any of the improper motives above suggested. We are well aware of the extent of the noble rescue work it has accomplished, and is accomplishing, and that its managers know-

ingly and intentionally consigned these little ones to the fate upon which they fell is unthinkable. We ascribe these motives and designs to the consignees of the children and the local priest who solicited the consignment. The accomplishment of these designs is chargeable to the apathy and indifference born of long usage in the distribution of foundling children and the "tactless stubborness" (opinion, folio 108, Tr. of Rec.) of the Agent Swayne, entrusted with the distribution of the children. Be this as it may, the delivery of these children to the moral outcasts to whom they were consigned, was a colossal blunder, fraught with the most appalling consequences to the innocent little ones, the rescue from which cannot be charged to the respondents as a fault. Counsel for the petitioner, who, at the beginning of the hearing, characterized the rescue as an act of lawlessness, ended by retracting such characterization and justifying and applauding the act.

The Court finds that each of the respondents is a fit and proper person to have the care, custody, control and education of the children; that, without exception, they have become greatly attached to the children and the children to them, and that it would be detrimental to each of said children to take

it from the custody of the respondent who now has it, and that the best interests of each of said children will be subserved by permitting it to remain in the custody and control of the respondent who now has it in his care. (Finding XII, folio 472, Tr. of Record.) This is a direct and positive statement of the ultimate fact upon which the judgment of the Court is based, and is couched in as strong language as is judicially fitting. But these, or any mere words, cannot express the strength of the attachment referred to. It may be asked how it is possible for so strong an attachment to be formed between the children and their foster parents in the few months that had elapsed from the time of their first connection with the children, and the hearing. We do not have to seek far for the answer. From the time of their birth the Foundling Hospital, through the children's attendents, had, no doubt, given these children such collective care as is possible in such an institution. Their sanitary and other physical needs had no doubt been carefully investigated and supplied, but they had never received, and could not receive, in such an institution, that individual care and attention—that personal affection, that the child's nature craves. When they received this personal affection in full measure for the first time

at the hands of their foster parents, whose own affections had been stirred by the children's pitiable condition, their hearts responded withan alacrity and to a degree that the child who had never lacked that personal affection could never know. That attachment has grown during the year and one-half that has elapsed since the hearing, until the ties of affection between the children and their foster parents are as strong as if the children were the fruit of their own loins. Death may sever these ties. Such severence would be regarded as the course of nature, or the result of the primeval curse, as philosophy or religious teachings may suggest, but we do not think these ties should or will be severed by judicial decree upon the facts appearing in the record in this case.

Respectfully submitted,

WALTER BENNETT,

A. A. HOEHLING,

Attorneys for Respondent.

APPENDIX.

Supreme Court of the United States.

No. 258

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,
vs.
JOHN C. GATTI.

Appeal from the Supreme Court of the Territory of Arizona.

The appellee herein, by A. A. Hoehling, Jr., and Walter Bennett, his attorneys, moves the Court to strike from the record in this cause the reporter's transcript of the testimony in said cause, being folios 129 to 457 of the printed transcript of record.

This motion is made upon the ground that the appellant has not assigned for error any ruling of the Court upon the admission or rejection of evidence (folio 118 Tr. of Record.) This Court, apart from exceptions duly taken to rulings on the admission or rejection of evidence, being limited to determining whether the findings of fact support the judgment, the

reporter's transcript of the evidence only encumbers the record and has no proper place or purpose therein.

A. A. HOEHLING, JR.,
WALTER BENNETT,
Attorneys for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 258.

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,
vs.
JOHN C. GATTI.

MARCH 5TH, 1906.

Eugene S. Ives, Esq.,
Attorney for Appellant.

SIR:—You will please take notice that motion, of which the above and foregoing is a true copy, will be presented to the Supreme Court of the United States, for its action thereon, at the time of the oral argument of

said cause, or its submission, upon the merits.

Respectfully,

A. A. HOEHLING, JR.,
WALTER BENNETT,
Attorneys for Appellee.

Service of copy of motion and notice acknowledged, this ..... day of March, 1906.

Attorney for Appellant.

Supreme Court of the United States.

No. 258.

THE NEW YORK FOUNDLING HOSPITAL, *Appellant,*
vs.
JOHN C. GATTI.

Appeal from the Supreme Court of the Territory of Arizona.

TERRITORY OF ARIZONA, } ss.
COUNTY OF MARICOPA. }

Walter Bennett, being first duly sworn, on his oath says: That he is one of the attorneys for the respondent in the above-entitled cause; that on the 5th day of March, 1906, he served

the motion and notice to which this affidavit is attached upon E. S. Ives (at Tucson, in the Territory of Arizona), one of the attorneys of record for the New York Foundling Hospital, petitioner and appellant herein, by then and there delivering to said E. S. Ives a true and correct copy of said notice and motion.

WALTER BENNETT.

Subscribed and sworn to before me this 8th day of March, 1906.

M. W. LORAINE,

[NOTARIAL SEAL] *Notary Public.*